BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARTON BECK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,728
NUTRIJECT, INC.	)	
Respondent	)	
AND	)	
	)	
GRANITE STATE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 1, 2013, preliminary hearing Order entered by Administrative Law (ALJ) Judge Rebecca Sanders.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the same record as did the ALJ, consisting of the Discovery Deposition of Barton Beck, taken on April 30, 2012; the Preliminary Hearing transcript taken on January 29, 2013, with exhibits; and the documents filed of record with the Division.

ISSUES

The ALJ found timely notice based upon K.S.A. 2011 Supp. 44-520(a). The ALJ went on to find the cause of claimant's bilateral shoulder problems was not clear, and that there is not enough evidence to find claimant's work activities are the prevailing factor in causing claimant's bilateral shoulder complaints.

The ALJ found the cause of claimant's low back problems more difficult to determine. She noted claimant was a poor historian and his history did not always corroborate with the medical records. The ALJ found claimant's preexisting intermittent symptomatic back pain did not become so severe that it rendered him unable to work until after he worked for respondent for eight years, performing work activities that were competent to cause claimant's current disability. She held the aggravation of claimant's preexisting low back condition was not the sole condition for claimant's current disability. Instead, the severe aggravation of that condition, caused by claimant's work activities, was the prevailing factor for his current low back injury and disability. The ALJ found claimant entitled to medical care for the low back injuries and ordered respondent to provide the names of two qualified physicians from which claimant may designate an authorized treating physician. Temporary total disability was ordered paid at the rate of $512.85 per week, for the period from February 7, 2012 until September 20, 2012.

The respondent requests review of whether the alleged injury to claimant's low back arose out of and in the course of claimant's employment with respondent; whether claimant provided proper notice; and whether the ALJ exceeded her authority in granting benefits. Respondent argues that the Board should reverse the ALJ's Order and deny benefits for claimant's low back injuries.

Claimant argues the ALJ's Order should be affirmed. In his brief to the Board, claimant waived any right to temporary benefits for his bilateral shoulders. Therefore, the only remaining disputes deal with claimant's low back complaints.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant testified that the majority of his work experience is in farming, mechanic work and driving a truck. He owns 80 acres of grassland, one acre of which he considers his yard, and on which his wife utilizes a riding lawn mower to care for.

Claimant began working for respondent on June 15, 2004, as a project manager/truck driver. Claimant's job was to find farmer customers willing to accept bio solid material from treatment plants to be placed on their fields for fertilizer. Claimant had to drive the trucks onto the farmland and spread the material. Each truck/trailer held 6,000 gallons of bio material. Claimant worked anywhere from 10 to 12 hours a day, including weekends, weather permitting. Physically, claimant had to drive, climb trailer tanks and perform mechanical work on the trucks and trailers. Over time, while working for respondent, claimant developed problems with his lower back. These problems continued to get worse the longer he sat in the truck and the more mechanical work he performed. Claimant last worked for respondent on February 3, 2012.

Claimant testified that on February 3, 2012, he had a phone conversation with Scott Wienands, Bruce Jensen, a co-owner and operations manager, and Brian Latusick, the Human Resources director, about ending his driving duties and focusing on his managerial duties. Claimant was not resigning, but just wanted to get out of the trucks because the trucks were hurting his back. Mr. Jensen asked about some surgery claimant was supposed to have which claimant had refused because it would have left him worse off. Claimant was told that they would talk it over and get back to him the following Monday. On Monday, February 6, claimant received a letter while at work, requesting his resignation. Claimant did not know what to do and, instead of signing the letter, he went home. He did not complete his work that day. Claimant testified that he continues to wait for a call from Scott Wienands regarding possible managerial work.

Claimant spoke with Mr. Jensen about a week after the February 3, 2012, phone call. Claimant testified that Mr. Jensen asked him to stay on and manage the operation for the Junction City job. Claimant agreed to do so and was told that Mr. Wienands would call him with the details, but Mr. Wienands never called claimant and he never heard from Mr. Jensen again.

On February 21, 2012, claimant filed an Application for Hearing citing injuries to his low back, left leg and left shoulder as a result of his work for respondent. Claimant testified that he started having pain in his back in 2011, while he was driving the truck. At first claimant wasn't sure what was causing his back pain. He then went to see his primary care physician, Dr. Debra Doubek, who prescribed pain medication and referred him to orthopedic surgeon B. T. Mellion, M.D., in November 2011. Claimant has had physical therapy and injections, but his back pain has continued to get worse. Dr. Mellion found claimant to be a candidate for surgery. But claimant has, so far, been unwilling to undergo surgery on his back.

Claimant testified that he reported his back issues to Mr. Jensen in August 2011 and discussed how the extensive sitting was hurting his back. Claimant testified that he also reported his ongoing physical complaints to respondent via Mr. Jensen on at least two occasions. The first conversation took place around July or August 2011. Claimant testified that he told Mr. Jensen he couldn't sit in the trucks all day like he used to. He was told to do what he could. He didn't ask for treatment or for workers compensation benefits. Claimant talked with Mr. Jensen again in November 2011, after he had an MRI that revealed bulging discs. At that time, surgery was presented as an option, but claimant declined. He did not reiterate that his work was hurting his back.

Claimant admits that he had a prior back injury in the 1990's while working on the family farm. He was injured when his leg got caught in a power take-off shaft. He was sucked into the shaft and his left leg was tore up and he hurt his back. His injuries were significant. He was life flighted to KU Medical Center. He did not require surgery, but was in a splint or brace for broken vertebrae. Claimant was diagnosed with a bony abnormality at the right pedicle and transverse process at L3, as displayed on a CT scan and plain x-

rays. However, the abnormality was later identified as an old fracture which did not properly heal. Claimant's back pain improved but never completely resolved. Paul Arnold, M.D., of the KU neurology department, opined that claimant's pain would never completely resolve so long as claimant continued at his farming job. Claimant filed a claim for the tractor accident and settled for $10,000. Claimant received treatment for this prior injury and his back got better.

Claimant testified that the only other thing that could have caused his back pain was when he fell off the tanker in 2005. He also landed on his left shoulder in this fall. Claimant did not report this incident, he just worked through it. No accident report was filled out, but respondent was aware of the fall. Claimant ultimately had surgery on his shoulder in 2007, with orthopedic surgeon Dr. Bryce Palmgren. Claimant's left shoulder continues to bother him sometimes and he was told that it would never be the same. Claimant also admitted to dislocating his shoulder at home helping his nephew deliver a calf. An MRI of his low back in 2007, indicated a degenerative disc, but no treatment was provided for the back.

Claimant testified that he did not start doing mechanical work for respondent until 2009 or 2010. This job required him to work on brakes, springs and trailers, while in awkward positions. Claimant testified that no physician has recommended that he stop driving a truck or performing mechanical work because it is hurting his back. He was told to stop doing what he was doing by Dr. Palmgren, but nothing more specific was mentioned. Claimant believed the reference was to the type of work he was performing. He has nothing in writing from the doctor about this. Both the mechanic work and driving causes the pain in claimant's back to worsen.

Claimant cannot sit for more than 30-45 minutes. He has trouble sleeping, and his pain radiates down into his left leg two to three times a week. Claimant's wife Cindy, testified at the Preliminary Hearing, that, in the spring of 2011, she talked with Mr. Latusick about claimant having back pain related to his work. She testified she told Mr. Wienands that the mechanic work claimant was performing was hurting claimant. She didn't specify where claimant was hurting.

Claimant's wife testified that she was present on February 3, 2012, when claimant talked to the owners of the company on the phone. She could only hear what claimant was saying and not what was said on the other side of the line. She remembers claimant informing Mr. Jensen that claimant's back had been bothering him and he could no longer get in the trucks. Claimant wanted to focus on the managerial part of his job.

Affidavits from Mr. Jensen, Mr. Wienands and Mr. Latusick were admitted into evidence at the preliminary hearing, marked as Exhibit D. All admitted having a conversation with claimant on February 3, 2012, regarding the back problem claimant was experiencing. Claimant advised the three that he had back pain sufficient to prohibit his driving for respondent. All deny that claimant advised the back pain was from his work with

respondent. All three contend claimant was planning on filing for Social Security disability benefits. Mr. Latusick also met with claimant at claimant's home on January 31, 2012, regarding claimant's inability to complete his job duties as the result of ongoing back pain.

An MRI performed in September 2007, displayed mild loss of disc hydration at L3-4, L4-5 and L5-S1. In June 2009, claimant developed low back pain with right leg radicular pain and right leg numbness. Claimant received epidural injections at L3-4 for the diagnosed degenerative disk disease and resulting low back pain. The history presented to Debra Doubek, M.D., claimant's family doctor, indicated a multi-year history of low back pain with lifting and bending aggravations.

In November 2011, claimant again sought medical treatment for low back pain. An MRI ordered by Dr. Doubek displayed left lateral disc bulging at L5-S1 with potential impingement on the left L5 nerve root. Claimant also had disc bulging at L3-4 and L4-5 without impingement at those levels. B. Theo Mellion, Ph.D., M.D., of the Abay Neuroscience Center, described claimant's past physical therapy and epidural injections for his low back pain as being unsuccessful. Dr. Mellion's recommendations included more physical therapy, traction and injections, which claimant rejected, based upon the lack of prior success. Dr. Mellion also discussed the possibility of a left L5-S1 microdiskectomy, which claimant also rejected. Dr. Mellion's letter of November 14, 2011, indicated claimant's back pain had recently increased. No indication of the cause was contained in the letter, although it was noted that claimant is a farmer with a long history of low back pain.

On April 19, 2012, at the request of his attorney, claimant was examined by board certified neurological surgeon, Paul S. Stein, M.D. Claimant displayed pain in the low back, extending into the left buttock and back of the left thigh. Dr. Stein determined that the work activities performed by claimant over the previous years represented an aggravation and exacerbation of claimant's low back pain, but the prevailing factor was the preexisting and previously symptomatic condition. Dr. Stein then met with claimant's attorney. He prepared a May 10, 2012, report which indicated he had been informed that the current law does not eliminate aggravation as a factor in determining causation, but only indicates that the '"injury is not compensable solely because it aggravates, accelerates, or exacerbates a preexisting condition"'.[1] His understanding was that an aggravation, if severe enough, could be considered a prevailing factor by itself. Dr. Stein then indicated a desire for the lumbar MRI films from September 21, 2007. Dr. Stein's last report, dated June 14, 2012, indicated a receipt of information regarding claimant's work activities with respondent over the years. He also acknowledged receipt of the MRI scan from September 2007. Dr. Stein then opined, assuming the accuracy of the description of claimant's work activities, that such activity would be a prevailing factor in the condition prior to February of 2012, with repetitive aggravation and acceleration of the degenerative

[1] P.H. Trans., Cl. Ex. 2 at 2 (Dr. Stein's May 10, 2012, report).

process. This makes claimant's work activities the prevailing factor regarding the current symptoms.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination, on July 10, 2012. The history provided to Dr. Murati included a description of claimant's work activities with respondent. In his letter of July 10, 2012, Dr. Murati stated that claimant's low back symptoms were the direct result of the work-related series of accidents through February 3, 2012, while claimant was employed with respondent. In a somewhat confusing analysis, Dr. Murati stated the following in the July 10, 2012, report:

> This claimant sustained a series of repetitive traumas at work that resulted in right shoulder bilateral hand complaints and low back pain. . . . He has extensive and significant preexisting history to his back for which at one time was considered for chronic pain management. There is no apparent preexisting history to his neck, upper back or bilateral hands. Therefore, the prevailing factor in the above named injuries, except for his lower back, is the series of repetitive traumas at work.[2]

Claimant was referred by respondent to board certified orthopedic surgeon David J. Clymer, M.D., on September 10, 2012. Dr. Clymer identified the materials provided to be "somewhat confusing as the verbal history, deposition testimony and brief history offered in your letter are not at all consistent with the actual medical records to some degree"[3] He noted the confusion with regard to the chronic and progressive nature of claimant's low back symptoms. He reviewed actual MRI films and obtained new x-rays of claimant's lumbar spine. Dr. Clymer noted Dr. Arnold's 1994 concerns that claimant's back symptoms would probably become chronic if he continued to do vigorous aggressive farming activities. He found no history of a specific work-related accident or fall, merely concerns over claimant's hard work on the farm.

Dr. Clymer diagnosed claimant with multilevel degenerative disk disease and degenerative spondylosis, which he described as essentially unchanged from 2007 to the present. He did note the apparent increase in low back symptoms beginning in the spring of 2009, in relation to a fall at home, which injured claimant's left shoulder.

Finally, Dr. Clymer stated:

> I feel this history is most compatible with a gradually progressive degenerative process in the low back which is principally the result of gradual progression in the degenerative changes which were present and noted prior to 2005 and well documented in an MRI study in 2007. While the repetitive nature of his work from

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[2] P.H. Trans., Cl. Ex. 2 at 9 (Dr. Murati's July 10, 2012, report).

[3] P.H. Trans., Resp. Ex. A. at 1 (Dr. Clymer's Sept. 20, 2012, report).

> 2004 up through 2012 may have been a contributing aggravating factor in this regard, I do not feel that this contribution is so significant as to rise to the level of being the primary and prevailing factor in this regard. Instead, I feel the primary and prevailing factor with regard to these chronic and progressive low back symptoms is clearly the preexisting degenerative process which has been documented in the past and noted by multiple physicians to correlate with some chronic lower back pain and also is consistent with the 2 MRI studies performed in 2007 and 2011 which show multilevel degenerative disk disease and degenerative spondylosis. I suspect the work-related activities may be a contributing factor in this regard probably causing some gradual progression in the degenerative process and some gradual increase in lower back and leg discomfort. However, I would also expect this gradual progression would occur simply with time, aging and other non-work-related activity. It is difficult to determine to what extent these symptoms might have been lessened if Mr. Beck worked in another position without such repetitive activity. Undoubtedly, he would have had some ongoing low back symptoms which would gradually progress with time. This progression might have been less severe had his work activities been more moderate. At most, however, I feel this work activity results in a contributing factor or aggravating factor but not the principal and prevailing factor in this regard.[4]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 2011 Supp. 44-501b, *et seq*.,

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[4] P.H. Trans., Resp. Ex. A. at 6-7 (Dr. Clymer's Sept. 10, 2012, report).

[5] K.S.A. 2011 Supp. 44-501b and K.S.A. 2011 Supp. 44-508(h).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2011 Supp. 44-501b(b).

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

K.S.A. 2011 Supp. 44-508(e) states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-520(a)(1) states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

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[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-198, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.

The ALJ determined claimant's date of accident in this matter to be February 6, 2012, claimant's last day worked with respondent. Respondent acknowledged claimant's last day worked for respondent in this matter would either be February 3 or 6, 2012. Respondent further acknowledged that if claimant suffered an injury by repetitive trauma, the date of injury would properly be either February 3 or February 6, 2012. Respondent also acknowledges notice was received on February 21, 2012, which would satisfy the provisions of K.S.A. 2011 Supp. 44-508(e). Respondent argues claimant failed to provide notice within 20 days of seeking medical treatment. Respondent argues claimant advised his primary care physician, Dr. Doubek that the driving for respondent was the cause of his back pain, citing page 35-36 of the preliminary hearing transcript. However, a review of claimant's testimony indicates claimant believed he had so advised Dr. Doubek, but he was not sure and had no idea on what date that information was provided the doctor. Additionally, the medical records from Dr. Doubek fail to mention the work-related connection between claimant's low back complaints and the driving duties. These records do not support respondent's position that claimant was seeking medical treatment for a work-related injury. This record is indecisive on this point. This Board Member finds notice was due within 20 days of claimant's last day of actual work for respondent, which respondent acknowledges is satisfied by the February 21, 2012 letter from claimant's attorney.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(A) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

It must next be determined whether the injuries to claimant's low back arose out of and in the course of the repetitive trauma associated with claimant's employment with respondent and whether that repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

This record contains three medical opinions regarding prevailing factor. Dr. Stein initially determined that claimant's duties with respondent aggravated and exacerbated claimant's low back pain, but the prevailing factor was the preexisting and previously symptomatic condition. After meeting with claimant's attorney and reviewing claimant's job duties with respondent, Dr. Stein modified his earlier opinion and found the job duties with respondent would be a prevailing factor regarding claimant's current symptoms.

Dr. Murati, claimant's other hired expert found claimant's job duties were the prevailing factor with the neck, upper back and bilateral hand symptoms, but specifically excluded the low back from that opinion. This seemingly contradictory opinion from Dr. Murati is confusing.

Finally, Dr. Clymer determined that claimant's history is most compatible with a gradual progression of claimant's degenerative changes which had been noted prior to 2005. While he found claimant's work activities to be a contributing factor or aggravating factor, he was unwilling to state those duties were the prevailing factor with regard to these chronic and progressive low back symptoms.

It is claimant's burden to prove his entitlement to benefits under the Kansas Workers Compensation Act. This Board Member finds claimant has failed to prove his work duties are the prevailing factor in the ongoing progression of claimant's low back problems. The Order of the ALJ awarding benefits for claimant's low back complaints is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[9] K.S.A. 2011 Supp. 44-534a.

CONCLUSIONS

Claimant has failed to prove that his job duties with respondent are the prevailing factor causing his low back condition. The Order granting benefits to claimant for these low back complaints is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 1, 2013, is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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